IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 3476 of 1998

with

CIVIL REVISION APPLICATION No 656 of 2000

For Approval and Signature:

HON'BLE MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MADHUR GARMENTS

Versus

HASMUKH SHOPPING CENTRE

Appearance:

1. First Appeal No. 3476 of 1998

MR MB GANDHI for Appellant

MR RJ SHARMA for Respondent No. 1

MR MAHENDRA K PATEL for Respondent No. 1

MR RAMNANDAN SINGH for Respondent No. 2-4

2. Civil Revision Application No. 656 of 2000

MR SURESH M SHAH for petitioner

MR MB GANDHI for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE A.M.KAPADIA

Date of decision: 26/04/2005

C.A.V. JUDGEMENT

1. Instant appeal under Section 96 of the Code of Civil Procedure ('the Code' for short) is directed against the order dated 29.4.1998 rendered below application Ex.1 in Precept Application No.314 of 1995 by the learned Judge (Court No.18), City Civil Court, Ahmedabad by which the appellant was ordered to pay a sum of Rs.1,87,500/- (Rupees one lac eighty seven thousand five hundred only) with cost of Rs.5,000/- to the respondents within a period of eight weeks from the date of the order till recovery of the said amount and the appellant was also directed that it shall not transfer its share in the immovable property in the name of Meghdoot Garments situated opposite Panchratna Building, Shop No.20, Ahmedabad.

2. For the sake of convenience the parties hereafter are referred to as they are arrayed in the trial court meaning thereby the appellant shall be referred to as 'judgment creditor' and respondents shall be referred to as 'judgment debtors'.

3. The short facts leading to the present First Appeal are as under:

3.1. Harmanchand Chunilal Shah, proprietor of appellant - Madhur Garments (judgment creditor) filed Summary Civil Suit No. 2610 of 1993 in the City Civil Court, Ahmedabad to recover an amount of Rs.57,974/- from the respondents, Hasmukh Shopping Centre and others (judgment debtors). Pending the suit, attachment application was moved and the Court granted the attachment and in the said matter, security was furnished by the judgment debtors.

3.2. Summons for judgment was taken out under the provisions of Order 37 of the Code by the judgment creditor. Since no leave to defend was filed by the judgment debtors, the learned Chamber Judge, Civil Civil Court, Ahmedabad, accepted the summons for judgment and accordingly decree was passed against the judgment debtors on 22.9.1994.

3.3. On the decree being passed, on 3.4.1995 the judgment creditor filed Precept Application No.314 of 1995 under Section 46 of the Code claiming attachment of

movable properties in the shop of the judgment debtors. The application was granted by the learned Judge of the City Civil Court and accordingly the learned Civil Judge (S.D.)., Himatnagar was directed by the Judge, City Civil Court, to attach the movable goods of the judgment debtors lying in the shop. On 16.10.1995 the judgment creditor had gone with the bailiff to the shop of the judgment debtors where the original judgment debtor Nos.3 and 4, Durgashanker Chhotalal Dave and his son Hasmukh Durgashanker Dave were present and they resisted the bailiff from doing anything. Thereupon the bailiff obtained police protection for carrying out his duty of attachment of the goods of the judgment debtors. In the course of this work, the judgment debtors left the shop and disappeared. The bailiff attached the goods of Rs.75,000/approximately in the presence of panchas and a detailed list of the goods attached was also prepared. Thereafter the goods attached were loaded in a tempo and the tempo was taken to the Civil Court (SD), Himatnagar. Then the Nazir and the Superintendent of the Himatnagar Court made necessary documents and a bida (cover) was given to be produced before the City Civil Court, Ahmedabad. The said cover was produced by the judgment creditor before the City Civil Court and requested the Court to sell the goods attached by the bailiff.

3.4. At that time the judgment debtors made an application for return of the attached goods. The learned Judge of the City Civil Court directed the judgment debtors to deposit Rs.75,000/- for return of the goods and accordingly the judgment debtors deposited the said amount. Thereafter the learned Judge of the City Civil Court appointed Miss Y.D. Saharkar, an advocate as Court Commissioner for return of the attached goods. The Court Commissioner, in presence of the panchas and in presence of her Senior Advocate R.J.Sharma, prepared a list of goods and handed over the attached goods to the judgment debtors. The judgment debtors took the goods without any objection as to the quality and quantity of the goods and got the custody of the same.

3.5. When the judgment debtors depositd Rs.75,000/- an order was passed by the learned Judge of the City Civil Court to hand over Rs.69,000/- to the judgment creditor. Against the said order the judgment debtors preferred Civil Revision Application No.129 of 1996 before this Court. When the said CRA came up for hearing, this Court (Coram: Late Mr. Justice S.D. Shah) did not interfere with the order passed by the learned Judge of the City Civil Court for handing over Rs.69,000/- to the judgment creditor and balance Rs.6,000/- to the judgment debtors.

However, since other complaints were made about the goods being attached were not returned on that basis an administrative inquiry regarding the conduct of the bailiff of the Himatnagar Court was ordered and directed the Executing Court to go for the valuation of the goods as well as the quantity and quality of the goods.

3.6. On the basis of the direction of this Court, the learned Judge of the City Civil Court taking up the execution proceedings evaluated the goods to the tune of RS.1,87,500/- and directed the judgment creditor to deposit the said amount alongwith cost of Rs.5000/- which has given rise to the present appeal.

4. Mr. MB Gandhi, learned advocate of the judgment creditor, has vehemently contended that the impugned order does not stand to scrutiny on a perusal of the evidence adduced and produced before the learned Judge of the City Civil Court. He has also asserted that the learned Judge has misdirected herself on the basis of the order passed by this Court in Civil Revision Application No.129 of 1996 wherein this Court has directed to hold administrative inquiry on the basis of the complaint made by the judgment debtors for the first time before him. It is also emphasised by him that at the time of returning the goods to the judgment debtors by the Court Commissioner Miss Y.D. Saharkar, they ought to have taken objection about the quantity and quality of the accepted goods. Thereafter with a view to get sympathy of the Court the judgment debtors made a complaint before the Court while hearing Civil Revision Application No.129 of 1996. It is also highlighted by him that there is no evidence worth consideration about the alleged complaint made by the judgment debtors. It is contended by him that the judgment debtors are in the habit of filing false and frivolous complaints. They are in the habit of purchasing goods on credit and thereafter at the time of demanding the amount of the said goods, they used to file false complaints against the creditors. It is also contended by him that at the time of preparing panchnama by the bailiff the judgment debtors left the shop. However, the bailiff prepared the panchnama in the presence of panchas and details were also mentioned in the panchnama. Thereafter the goods were carried in a tempo to the Court of Civil Judge (S.D.)., Himatnagar where he handed over the goods to Nazir and Superintendent of the said Court who made necessary documents. It is vociferously contended by him that according to the order passed by the learned Judge of the City Civil Court, all the Government officers including Nazir and Superintendent are liars and the judgment

debtors are the only persons who can be believed. He has further contended that a complaint of theft (loot) was also given before the JMFC, which was numbered as M. Case No.110/1995. However, during the police inquiry, the complaint was found false and therefore B summary against the said complaint was sought for which was granted by the learned Magistrate. Against the said judgment, Criminal Revision Application No.288 of 1996 was preferred which came to be dismissed by this Court (Coram: S.D. Pandit, J.) vide order dated 9.10.1996. Therefore, according to Mr. Gandhi, the learned Judge, merely by relying upon the oral statement of the judgment debtors, came to the erroneous conclusion that goods of larger value than that of the decretal amount were seized on 16.10.1995 while executing the order of precept and the approximate value of such goods is proved to be Rs.1,87,500/- and since the said large amount of attached goods not having been reflected in the panchnama have not been returned by the judgment creditor, he was directed to pay the said amount to the judgment debtors. Lastly it is also pointed out that the conduct of the judgment debtors is such that they are in the habit of not paying the amount of the purchased goods and just with a view to get the sympathy of the Court, false complaints are being filed against creditors. On aforesaid premises, Mr. Gandhi, learned advocate of the judgment creditor, has prayed that the impugned order deserves to be quashed and set aside by allowing the appeal. He therefore urged to allow this appeal.

5. In counter submission, Mr. Ramnandan Singh, learned advocate of the judgment debtors, has contended that the intention of the judgment creditor is not fair and bonafide. According to him, the judgment creditor in collusion with other persons, that is, Government officers and police personnel, harassed and ruined the family of the judgment debtors and also disturbed and discontinued the study of their children and whole family has become hand to mouth on account of the mischief of the judgment creditor. While drawing the attention of this Court to the evidence of various witnesses examined during the course of inquiry by the learned Judge, it was pointed out that their evidence do not suffer from any vices. The learned Judge has rightly evaluated the evidence of those witnesses and thereupon on finding substance she passed the order which does not call for any interference in this appeal. He therefore prayed to dismiss the appeal.

6. This Court has considered the submission advanced by the learned advocates appearing for the parties,

perused the impugned order and the set of evidence supplied by the learned advocates appearing for the parties and the documents attached with the memo of appeal so also the judgment cited at the bar.

7. Before examining the rival contentions and the impugned order, it would be appropriate to advert to the undisputed facts of the case.

(I) So far as the filing of Summary Civil Suit No.2610 of 1993 by the judgment creditor against the judgment debtors in the City Civil Court, Ahmedabad for recovering Rs.57,974/-; taking out of summons for judgment under Order 37 of the Code, passing of the order by the learned Chamber Judge by accepting the summons for judgment and passing of decree on 22.9.1994; filing of Precept Application No.314 of 1995 on 3.4.1995 under section 46 of the Code; obtaining of Precept for attachment of movable properties in the shop of the judgment debtors, are not in dispute.

(II) The judgment creditor had gone with bailiff to the shop of the judgment debtors for carrying out attachment of the goods of the judgment debtors; attaching goods worth RS.75,000/-; taking those goods in a tempo to the Civil Court (SD), Himatnagar, handing over the goods of Nazir and Superintendent of the Court of Civil Judge (S.D.)., Himatnagar are also not in dispute.

(III) Filing of the application by the judgment debtors for return of the goods; order passed thereon to return the goods on condition of depositing Rs.75,000/- by the judgment debtors are also not disputed. Handing over of Rs.69,000 out of Rs.75,000 to the judgment creditor and Rs.6,000/- to the judgment debtors is also undisputed.

(IV) Filing of the Civil Revision Application No.129 of 1996 before this Court by the judgment debtors also is undisputed. The fact that while disposing of the revision application, the learned Judge of this Court had directed the learned Judge of the City Civil Court, Ahmedabad to hold an administrative inquiry regarding the conduct of the bailiff of the Court of Civil Judge (SD), Himatnagar and also directed the Himatnagar Court to go for the valuation of the goods as well as the quantity and quality are not in dispute.

(V) The fact that in pursuance of the aforesaid order, the District Judge, Himatnagar initiated administrative inquiry against the bailiff of the Civil Court (SD), Himatnagar and the outcome of the inquiry was

that the bailiff was exonerated from all the charges is not disputed. Exh.157 and 158 (Pages 27 to 43 of the paper book Part-I) is the report of the District Judge, Himatnagar. The judgment debtors had filed Criminal Complaint against the bailiff of the Civil Court (SD), Himatnagar as well as against the sons of the judgment creditor Arvindbhai and Hitendrakumar on 8.11.1995. In the said complaint the allegation was made about theft of goods (loot). The said case was registered as M. Case No.110 of 1995 in the court of the learned JMFC, Himatnagar who directed the police to inquire into the case and to report. Police investigated the case and during the course of investigation police found that the complaint was false and therefore B Summary was sought for which came to be accepted by the learned JMFC, Himatnagar. Against the said order, Criminal Revision Application No.288 of 1996 was filed by the judgment debtors in this court which came to be dismissed on 9.10.1996.

(VI) The judgment debtors filed Civil Misc. Application No. 792 of 1995 before the trial court for setting aside the ex-parte decree passed in Summary Civil Suit No.2610 of 1993 and to restore the summary suit. In the said application, after hearing both the sides, ex-parte decree was set aside and the suit was restored to its file. As the amount of RS.69,000 being the decretal dues were given to the judgment creditor, the learned Judge of City Civil Court directed the judgment debtors to file their written statement. Against the order of restoration, the judgment creditor filed Civil Revision Application No.466 of 1997 before this Court and this Court (Coram: S.K. Keshote, J.) dismissed the same vide order dated 7.10.1998. After the said suit was restored, the judgment debtor made application for refund of the amount of Rs.69,000/- given to the judgment creditor with interest at the rate of 12%. The said application was granted and a sum of Rs.1,02,120/- which were deposited in the court of the City Civil Judge, Ahmedabad were ordered to be paid to the judgment debtors. These facts are also not in dispute.

(VII) Aggrieved by the said order, the judgment creditor filed Civil Revision Application No.1813 of 1998 before this Court in which this Court (Coram: S.K. Keshote, J.) passed an order dated 26.10.1998 that the said amount be given to the judgment debtors on giving an undertaking that they shall return the said amount with interest at the rate of 21% within 15 days in case the Summary Civil Suit No.2610 of 1993 is decreed and in case the amount is not deposited within 15 days of the decree

the judgment debtors shall be responsible for contempt of Court. On the basis of the said order the judgment debtors filed an undertaking on 28.3.2000 in Civil Misc. Application No.22 of 2000 in the City Civil Court.

(VIII) Thereafter again the summary suit came up for hearing before the Judge, City Civil Court and on that day the judgment debtors did not appear and therefore a decree was passed on 21.7.2000. After passing ex-parte decree for the second time, the decree was transferred by the judgment creditor to the Himatnagar and after transfer, Darkhast Petition No. 15 of 2001 was filed in the Himatnagar Court wherein notice was issued. Thereafter again the judgment debtors filed Misc. Civil Application No. 672 of 2001 for setting aside the ex-parte decree passed in summary suit and to stay the execution. Again second time the order was passed for restoration. These facts are also not in dispute.

8. Alongwith the appeal, the judgment creditor has annexed the following documents:

Paper Book - I

Page No.6. Schedule of description of movable properties in the shop of the judgment debtors (Rs.65,000/- readymade good and Rs.10,000/- furniture).

Page No.7. Total value of the goods taken in attachment Rs.74,910/-

Page No.10. Complaint of theft (loot) and criminal inquiry No.191 of 1995. Allegation is that at 1.15 on 16.10.1995 goods of Rs.3,40,575/- collected and taken away in tempo No.GJ-9T-1189 and again there was a second visit by the bailiff and goods of Rs.2,51,076/- were taken away.

Page No.44. Complaint given on 8.11.1995.

Page No.22. Report of the Commissioner of City Civil Court by whom goods at Himatnagar were returned to the judgment debtors.

Page No.26B. About complaint given against bailiff Suthar.

Page No.26C. Order in Revision Application No.399 of 1997 and 400 of 1997. These revision applications were against the rejection of application Exh.125, 127 and 129 by the learned Judge Ms.S.G. Gokani in the Court of inquiry. Both the revision applications were allowed by this Court and directed the office to issue summons

to the judgment debtors to produce books of accounts for the years 1993-94 and 1994-95.

Page No.36. Statement of the complainant Durgashanker (contradiction) that in the complaint Durgashanker Dave has stated that he was not present whereas in the statement he has stated that he was present when the bailiff came for attachment of the goods. Thus, in the complaint and in the police statement contradictory statements are made.

Page Nos.53, 54-59. Statement dated 21.1.1995 of Durgashanker Chhotalal Dave. In this statement of Durgashanker he has not uttered a word about second visit of the bailiff and taking away the additional goods nor he has made out any case for false preparation of panchnama or not writing of any items.

A case is also made out that a panchnama was prepared at the Hotel Paramount which belongs to Pyar Ali. However in the statement of Durgashanker at page Nos.53, 54-59 he does not say a word that panchnama was prepared at Hotel Paramount.

Page No.56. Complaint at Ex.199 dated 17.10.1995. In this Durgashanker has stated that he was present.

Page Nos.71-73 Exh.202 Panchnama that was made by the bailiff at Himatnagar.

Page Nos.82-90 B Summary order of the Magistrate Exh.179. In the order of JMFC on page 89 there is a finding of the competent court to the effect that there was no loot at all. Once the finding of the competent court is arrived at, question of holding any inquiry repeatedly in the matter does not arise.

Page 134. Order of the High Court (Coram: S.D. Pandit, J.) against the said B summary of Criminal Court (JMFC).

Page 93. Exh.183. This is a panchnama whereby all the goods attached by the bailiff were returned to the judgment debtors by the City Civil Court.

Page Nos.113, 119 and 121 These are the relevant documents with regard to return of muddamal and police

in the investigation had recorded the statements of the judgment debtors wherein they have stated that they have received muddamal. There is no utterances of change of quality or quantity and not an iota of reference that they have received less goods.

Page 126. Affidavit of Ibrahim the driver of the tempo to be read with pages 123-125. In this connection, it may be noted that the driver Ibrahim was not knowing and was not properly educated and therefore a false affidavit was prepared by the judgment debtors and presented before the Court and therefore he himself has come to the Court for deposition and stated that his false affidavit was taken and true facts were deposed by him. He also filed a new affidavit cancelling his old affidavit taken by Durgashanker Dave.

Page 129-131 These are the documents again of Pyar Ali, owner of Hotel Paramount from whom also false affidavit was taken that panchnama was made at his hotel. But when he came to know about the same, he filed a correct affidavit at page 131 stating that the panchnama was not made in the hotel but it was done in the shop itself.

9. In the backdrop of the aforesaid undisputed facts, the documents which are forming part of the appeal memo compilation, a perusal of the impugned order and the evidence produced before the learned Judge, following facts situation are noted by this Court.

10. As per the order of this Court, the judgment debtors gave a complaint to the District Court, Himatnagar and an inquiry was conducted and in that inquiry it was found that there was no substance and the bailiff was exonerated. The report made by the District Judge was also produced before the learned Judge of City Civil Court. However, the learned City Civil Judge has ignored the said report exonerating the bailiff. The learned Civil Judge (SD), Himatnagar had also investigated into the matter and made a report to the District Judge. However, these two reports which were produced alongwith the list Exh.157 and 158 were not exhibited wrongly by the learned City Civil Judge (which are on page 28 of the Paper Book part I.) On perusal of the same dated 15.11.1995, it is seen that the learned

Civil Judge (S.D.)., has mentioned as under:

"it transpires from the statement made by the bailiff as well as decree holder that both Durgashanker Revashanker and his son Hasmukhbhai Durgashanker had quarrelled with the decree-holder and thereafter they had run away and the bailiff had to call the police to maintain the spirit of the order of the court for satisfying a decree. Looking to the decree and attitude of both these persons, it appears prima facie that as such, it was the duty of both the decree-debtor to cooperate in the execution proceedings but their attitude appears to be hostile and on the counter-blast, they have attempted to make an allegation against the very senior serviceman of this court like Mr. Suthar."

11. The judgment debtors had also filed a criminal complaint of theft against the judgment creditor in the court of learned JMFC, Himatnagar which was sent for police investigation. During the course of police investigation, it was found that theft with respect to excess goods as alleged in the said complaint was not committed nor it revealed that excess goods were taken away without recording any thing in the Commissioner's report and therefore the investigating officer found that the complaint filed was false and therefore he sought for B summary. The learned JMFC granted B summary. The said order was challenged by the judgment debtors by filing Criminal Revision Application which also came to be dismissed.

12. In sum and substance, case of theft (loot) as alleged by the judgment debtors against the judgment creditor has not been proved nor any proof before the competent court to establish that theft was committed and excess goods were taken away without recording anything in the Commissioner's report was produced. Notwithstanding the aforesaid fact, the learned Judge of City Civil Court who conducted the inquiry by virtue of the order passed by this Court has given adverse finding without any substance.

13. It is an allegation made by the judgment debtors that twice attachment was made. Looking to the statement of Hasmukh and Durgashanker Dave before the police, there is no case of second visit of the judgment creditor with the bailiff and therefore the case was not established and the learned Judge has erred in coming to the

conclusion that twice attachment had taken place and goods were taken away.

14. There is no evidence to the effect that Police Sub Inspector Solanki was present. On the contrary, the police officers who were called by the bailiff when the commission work was objected to by the judgment debtors and the police have also deposed that PSI Solanki was not present. In spite of that the police officers have not been believed by the learned Judge who conducted the inquiry. Therefore, it is very difficult to believe that PSI Solanki was present at the time when the panchnama was prepared. On the contrary, record was called for by the learned Judge of the City Civil Court from the police station wherein it is mentioned that PSI Solanki was present in the police station. The statement of Durgashanker Dave Ex.57 has been wrongly relied upon by the learned Judge.

15. Coming to the oral evidence of the adjoining owners of the shop at Himatnagar, their evidence at Ex.69 and 94 were wrongly relied upon. On perusal of the said evidence, it has to be held that they were chance witnesses and as such they were not present when attachment was done. So far as witness Sevantilal Ex.94 is concerned, he was not the original person and in his place someone else was introduced as witness and his evidence was recorded. Therefore, said Sevantilal filed Civil Revision Application No. 656 of 2000 which is also tagged with this appeal pursuant to the order dated 5.7.2000 passed by this Court (Coram: Kundan Singh, J.) stating that he has never gone to the Court of law for giving evidence. If this is the fact situation then how Sevantilal can be relied upon?

16. Evidence of Vinodbhai, who is a fruit vendor in cart, is at Ex.29 and his evidence has been wrongly relied upon by the learned Judge as he is a by-passer and cannot be relied upon.

17. Suthar, bailiff of the Himatnagar Court, has also given his evidence. He is an officer of the Court against whom all the charges are disproved and therefore such a man ought to have been appropriately believed and relied upon. But the learned Judge of the City Civil Court has disbelieved his evidence. Not only that but the Clerk of the Court had also come and deposed before the Court. Nazir/Superintendent of the Himatnagar Court had also come and deposed as to what happened. However, all the relevant evidence of the Court officers are disbelieved by the learned Judge without assigning any

cogent reason.

18. Mansing, Police Officer, was examined at Ex.100. Arvind Khemabhai, a police officer was also present before the Court who was examined at Ex.115 and both the officers said that PSI Solanki was not present. Therefore there was no reason for the learned Judge to disbelieve the police officers and other Court officers.

19. Hasmukh Padia, Ex.213, a witness to the panchnama whose evidence was also wrongly discarded. Therefore there is no reason to believe that attachment was done twice. In fact attachment had taken place only once. There is also no evidence of the second attachment.

20. According to the statement of the judgment debtors, they were present but before the learned Judge they tried to come out with a case that they were not present. In this background, the judgment debtors are also under the clouds and wrong depositions are given. They have wrongly testified on oath before the learned Judge.

21. The learned Judge has wrongly given reasoning by stating that no member of the shop of the judgment debtors has signed the panchnama. On perusal of the said panchnama it is clear that the bailiff had taken the signature of Hasmukh Padia, a panch witness and when the judgment debtors were not cooperating when panchnama had begun then naturally his employees cannot be called upon to sign the panchnama and thereafter to turn down or to create any conflict or doubt against the work of Court Commissioner and therefore when independent person has signed the panchnama and has deposed before the Court then there is no ground for disbelieving the report of the Commissioner. According to this Court, when independent person, that is, panch witness Hasmukh Padia has signed the panchnama and deposed before the Court, there is no reason to disbelieve the commissioner's report.

22. Evidence of Ibrahim Ex.235 has been wrongly relied upon by the learned Judge. Looking to the record and contentions taken by the judgment creditors, Ibrahim was ordered to come on 20.3.1998 as per the summons but he came on 19.3.1998. His evidence was recorded in the presence of the judgment debtors and therefore the judgment creditor has not been provided with opportunity to cross-examine him. In fact he has deposed that he had come only once and story of two visit is disbelieved and he has filed a separate affidavit Ex.60 that he visited

only once. Oral evidence of Pyar Ali, the owner of the Hotel is wrongly rejected by the learned Judge.

23. Statement of Durgashanker Dave who has stated that he has received all the goods has been wrongly discarded. Once the goods were received back, there is no question of its evaluation and whatever is received has gone back to his hands and therefore the inquiry was uncalled for. In this connection, document Ex.13 and 24 are the statements which have been wrongly relied upon. These statements are totally contrary to the Commissioner's Panchnama made by the Court officer.

24. Bank Manager was examined with regard to the stock statement and he has also been wrongly relied upon because in the offer for loan the inflated statements are submitted. The judgment debtors have not produced books of accounts though this court passed an order in CRA No.399 of 1997 and 400 of 1997 and thus on one hand the judgment debtors are suppressing the true facts of production of books of accounts and in absence thereof, there cannot be any oral evidence to say that there are more goods and excess goods were taken away by the bailiff.

25. It may be noted that the books of accounts and stock register are the primary evidence and without the same being produced, the Court cannot jump to the conclusion about excess goods being taken away and therefore the entire story concocted by the judgment debtors requires to be rejected.

26. It may be appreciated that the judgment debtors had made statement while recording order in CRA No.399 of 1997 and 400 of 1997. On the basis of the statement made by them that they will produce the books of accounts of 1993-94 and 1994-95 the order was passed and thereafter when the inquiry was conducted in the year 1998 in a short span they found the production of document would go against them and therefore they made a false statement that books of accounts are destroyed and they are not able to produce the same. If that be so, it has to be held that they have intentionally not produced the books of accounts for the years 1993-94 and 1994-95 as they would go against them and therefore they have suppressed the best piece of evidence which would have thrown abundant light on the point at issue. Besides this there are lot of contradictions in the statements and the evidence adduced before the Court. Therefore, adverse inference is required to be drawn against the judgment debtors. In this connection, it is advantageous to refer

to the judgment in the case of Gopal Krishnaji Ketkar v. Mohamed Haji Latif and others, reported in AIR 1968 SC 1418. In the said case, the Supreme Court has ruled that a party in possession of best evidence which would throw light on the issue in controversy if withholding it, the Court ought to draw an adverse inference against him notwithstanding that onus of proof does not lie on him. A party cannot rely on abstract doctrine of onus of proof or on the fact that he was not called upon to produce it. Applying the principle laid down by the Supreme Court in the above referred to judgment to the facts of the present case, when the judgment debtors have not produced the books of accounts for the years 1993-94 and 1994-95 in spite of their statement made before the Court, adverse inference is required to be drawn against them that if those documents would have been produced, it would have gone against them.

27. For the purpose of stock statement submitted to the bank which is relied upon but for that also details are required to be produced to establish that a particular stock existed on the relevant date. The bills which are produced before the Court were not exhibited and therefore unless the bills were exhibited stock register could not have been relied upon because stock registers are secondary evidence whereas bills are the primary evidence. So far as the stock statement was concerned, statement sent to the bank was dated 5.12.1995 whereas the evidence which was required was of dated 16.10.1995 and there was a difference of two months and therefore the stock statement was not relevant.

28. So far as the bills which were produced by the judgment debtors were not genuine but they were bogus and got up. For the purpose of ascertaining whether the bills were right or wrong, the judgment creditor had written a letter to the party to know the same and party had given in writing that they have not sold any goods to the judgment debtors and therefore the bills were fabricated.

29. Similarly, when such goods were purchased, octroi, CST and Sales tax were also liable to be paid but no evidence is produced for the same and therefore it is doubtful that such goods were ever present in the shop of the judgment debtors at Himatnagar and therefore the bills which were without the Sales tax Number and CST Number were bogus and they cannot be relied upon.

30. On over all view of the matter, this Court does not find itself in agreement with the reasoning given,

conclusion arrived at, findings recorded and final order passed by the learned trial Judge as according to this Court, the learned trial Judge has misdirected herself in passing the order merely on the basis of the order was passed by this Court. It is true that an order was passed by the Court to conduct inquiry but that does not mean that the learned Judge has to pass order in favour of the judgment debtors ignoring the available evidence in the form of order passed by the learned Civil Judge (SD), Himatnagar exonerating the bailiff as well as B summary granted by the learned Magistrate in the criminal complaint filed by the judgment debtors against the judgment creditor and other available evidence which have been adverted by this Court in the foregoing paragraphs.

31. According to this court, the learned trial Judge has ignored all these aspects in complete disregard to the settled principles of appreciation of evidence in the matter of inquiry.

32. Seen in the above context, the impugned order does not stand to scrutiny which is deserved to be quashed and set aside by allowing this appeal.

33. For the foregoing reasons, the appeal succeeds and is accordingly allowed with no order as to costs. The impugned order dated 29.4.1998 recorded below application Ex.1 in Precept Application No. 314 of 1995 by the learned Judge (Court No.18), City Civil Court, Ahmedabad, directing the judgment creditor to pay a sum of Rs.1,87,500/- to the judgment debtors with cost of RS.5,000/- is hereby quashed and set aside. The amount of Rs.1,87,500/= plus cost of Rs.5,000/- which is deposited by the judgment creditor in the trial court which has been invested in a schedule bank in fixed deposit shall be refunded to the judgment creditor together with the accrued interest thereon upon due verification forthwith.

CIVIL REVISION APPLICATION NO. 656 OF 2000

34. Civil Revision Application No.656 of 2000 is filed under section 115 of the Code by the revision petitioner challenging the order dated 6.4.2000 recorded below application Ex.6 in Civil Misc. Application No.960 of 1999 (arising out of Precept Application No.314 of 1995) by the learned Judge, (Court No.18), City Civil Court, Ahmedabad by which the application has been dismissed with no order as to costs.

35. Revision petitioner Sevantilal Prabhudas Modi had

sent an application dated 3.12.1999 by RPAD to the Court of learned Judge, City Civil Court, Ahmedabad inter alia contending that during the course of inquiry proceedings as ordered by this Court the judgment debtors have examined a fictitious man in his place. It was inter alia contended that he has never appeared before the inquiry proceedings before the learned Judge. He had no knowledge about the litigation between the parties. Therefore, he has prayed to inquire into the matter as in his place somebody else was examined before the learned Judge.

36. While passing the order on the said application, the learned Judge has observed that since the order passed in the inquiry was also subject matter of challenge in the First Appeal before this court and the High Court is seized of the matter and the entire appeal was to be heard on merits, it would not be proper to decide the same. Resultantly, she filed the application vide order dated 6.4.2000 which has given rise to this revision at the instance of Sevantilal Prabhudas Modi who has sent the application Ex.6.

37. Pursuant to the order dated 5.7.2000 passed by this Court (Coram: Kundan Singh, J.) this Civil Revision Application came to be tagged with First Appeal No. 3476 of 1998.

38. This Court has considered the submissions advanced by Mr. Mehul Shah, learned advocate of the revision petitioner and Mr. Ramnandan Singh, learned advocate of the respondents.

39. There is no dispute that there is a relationship between the petitioner and the respondents as tenant and landlord. There having serious dispute with regard to necessary supplies to the tenant, Special Civil Application has been moved before this Court being SCA No.2710 of 1999 where the dispute has arisen out of landlord and tenant. It may be noted that while deciding First Appeal, this Court has discarded the evidence of Sevantilal Ex.74. Therefore this Court does not deem it expedient to examine whether in fact Sevantilal was examined before the learned Judge or in his name some other factitious person was examined by the judgment debtors. Even if it is believe that Sevantilal had deposed before the Court and thereafter he has turned hostile in that case also his evidence cannot be given any credence and therefore this Court has not believed him.

40. In aforesaid view of the matter, no useful purpose would be served after a period of ten years to initiate inquiry to ascertain as to whether Sevantilal himself had deposed before the learned Judge or any other person in his place was examined.

41. Seen in the above context, this revision application deserves to be rejected.

42. For the foregoing reasons, the revision application fails and accordingly it is rejected with no order as to costs.

(A.M. Kapadia, J.)

43. On pronouncement of the judgment in Court, Mr. Ramnandan Singh, learned advocate of the judgment debtors states that the judgment debtors are desirous to approach the higher forum and therefore to enable them to approach the higher forum, the judgment rendered by this Court by which an amount of Rs.1,87,500/- plus cost of Rs.5,000/= together with interest accrued thereon upon shall be refunded to the judgment creditor upon due verification may be stayed for a period of four weeks hereof.

44. The prayer made by Mr. Ramnandan Singh, learned advocate of the judgment debtors has been opposed by Mr. MB Gandhi, learned advocate of the judgment creditor. According to him, the amount has been deposited by the judgment creditor pursuant to the order passed by the trial court and this Court has allowed the appeal and therefore the judgment creditor should be permitted to get back the said amount. He therefore urged that the prayer made by the learned advocate of the judgment debtors may be rejected.

45. This Court has given anxious and considerate thought to the submissions made by the learned advocates appearing for the parties. Having regard to the facts and circumstances emerging from the record of the case, since the amount has been deposited with the trial court pursuant to the order passed by the trial court which has been also invested in a scheduled bank in a fixed deposit, if the prayer made by Mr. Ramnandan Singh, learned advocate of the judgment debtors is accepted, no prejudice would be caused to the judgment creditor.

46. In aforesaid view of the matter, operation and implementation of this judgment shall remain stayed qua the refund of the amount of Rs.1,87,500/- plus cost of RS.5,000/- together with the accrued interest thereon for

a period of four weeks hereof.

(A.M. Kapadia, J.)

(karan)